Office-Supreme Court, U.S.
FILED
APR 8 1966
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1055

R.P.R. CONSTRUCTION COMPANY,
AN ARIZONA CORPORATION,
Petitioner

VS.

BUSHMAN CONSTRUCTION COMPANY,
A MISSOURI CORPORATION,
Respondent.

REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HIESTER, TANNER & CLANAHAN
C. BLAKE HIESTER, BILL EARL TOM
& BARKLEY L. CLANAHAN

1950 Western Federal Savings
Building
Denver, Colorado 80202

Attorneys for Petitioner

EASTWOOD PRINTING CO. • 2854 LARIMER STREET • DENVER, COLORADO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1055

R.P.R. CONSTRUCTION COMPANY,
AN ARIZONA CORPORATION,
Petitioner

VS.

BUSHMAN CONSTRUCTION COMPANY,
A MISSOURI CORPORATION,
Respondent.

REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW AND STATEMENT OF THE CASE

Counsel for respondent state in their brief in opposition to the Petition for Writ of Certiorari that the statement of the case and the presentation of the questions for review are inaccurate in that these sections of the petition are premised upon the assumption that the relationship between respondent and Conner was secret and not known to petitioner.

The statement of the case and questions for review are not inaccurate and the relationship between respondent and Conner was secret and not known to petitioner which fact was found by both the trial court and the Tenth Circuit Court of Appeals. A careful reading of the opinions of the trial court (Appendix A, pp. 10-24) and Tenth Circuit Court of Appeals (Appendix B, pp. 25-31) will show the Court that the statement of the case and questions for review are taken and arrived at from the findings of fact by both courts.

The trial court found the following facts in this connection:

Sometime prior to May, 1958, petitioner was awarded a first tier subcontract to construct housing at the Air Force Academy.

Conner then negotiated with petitioner for a subcontract for part of the work.

In the latter part of April, 1958, petitioner told Conner he could have the subcontract and gave Conner a letter of intent to that effect.

In May, 1958, Conner contacted respondent to get its help in obtaining a bond and financing.

On May 22, 1958, petitioner and Conner executed their subcontract and work was commenced thereunder on May 25, 1958.

On or about June 2, 1958, respondent *after investigating the job and Conner's subcontract with petitioner* told

Conner it would prepare an agreement to be entered into with Conner. This joint venture agreement was entered into on June 3, 1958 (Appendix A, pp. 19-11, Emphasis supplied).

All of these findings of fact were confirmed by the Tenth Circuit Court of Appeals (Appendix B, p. 26).

The trial court found that petitioner was never advised, until the institution of respondent's action, of the terms of respondent's and Conner's Agreement. The only knowledge that petitioner ever had of respondent was that it was the indemnitor on Conner's bond and that it was financing Conner, and this knowledge was acquired *after the execution of petitioner's subcontract with Conner.* At no time prior to the institution of suit was petitioner advised that respondent claimed to be a joint venturer with Conner (Appendix A, pp. 12-13, Emphasis supplied).

The Tenth Circuit Court of Appeals confirmed these findings also (Appendix B, p. 29).

There is no finding by either court that petitioner agreed to or accepted any assignment of the funds due Conner under his subcontract with petitioner.

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The trial court's and the Tenth Circuit Court of Appeals theory of liability is based upon the rule announced in *School Dist. No. 3 v. Central Savings Bank & Trust Co.*, 113 Colo. 487, 159 P.2d 361, and *Mitchell v. Bowman*, 10 Cir. 123 F.2d 445.

The Tenth Circuit Court of Appeals stated that these cases establish a right in the nature of a lien in favor of one who *assists* in bringing a fund into existence (Appendix B, p. 30, Emphasis supplied). The cases from the Fourth and Ninth Circuits cited by counsel for petitioner in its Petition for Writ of Certiorari are to the same effect.

We have no argument with the law as pronounced by these cases.

Our argument is directed to the application and interpretation of the law pronounced in these cases by the trial court and Tenth Circuit Court of Appeals to the facts as found by both courts.

What counsel for respondent, the trial court and Tenth Circuit Court of Appeals have failed to recognize is that these cases only establish such a right to a lien in favor of a person who has *created or assisted in the creation* of the fund to which the lien would attach (Emphasis supplied).

Before petitioner can be liable under the courts theory, petitioner would have had to know of respondent's agreement to finance Conner and indemnify Conner's bonding company *before* petitioner entered into its subcontract with Conner, and this knowledge would have had to have been the inducement for petitioner to execute its subcontract with Conner (Emphasis supplied).

Under the facts of this case as found by the trial court and Tenth Circuit Court of Appeals, no lien can exist in favor of respondent as respondent clearly had no part in

creating the fund arising out of petitioner's subcontract with Conner. Petitioner had awarded the subcontract to Conner by letter of intent in April, 1958, and executed the formal subcontract on May 22, 1958, and work was commenced on May 25, 1958, under this contract. It was not until June 3, 1958, that Conner and respondent entered into their joint venture agreement and this was after respondent had investigated the job and Conner's subcontract with petitioner. It was not until the last of June or early July, 1958, that petitioner was advised that respondent was the indemnitor on Conner's bond and that respondent was financing Conner (Appendix A, p. 12. Appendix B, p. 27).

The Tenth Circuit Court of Appeals in *Bushman v. Conner*, 307 F.2d 888, 893, said that *the date of the formation of the joint adventure between Conner and respondent is a material fact* in order for respondent to prevail against petitioner.

How, under these facts, can the trial court and the Tenth Circuit Court of Appeals hold that respondent created or assisted in creating the fund under petitioner's contract with Conner. This is the only fund established and respondent had nothing to do with its creation or award to Conner.

The trial court and the Tenth Circuit Court of Appeals has so far departed from the accepted law and usual course of judicial proceedings and the Tenth Circuit Court of Appeals has so far sanctioned such a departure by the district court that this Court's supervision is necessary. If the holding of the trial court and Tenth Circuit Court of Appeals is not reversed so as to conform to the law of

the Tenth, Ninth and Fourth Circuits no person will be free to contract with another without the possibility of being held liable to a third person with whom he has no contract on the theory of an equitable lien. It is obvious that to uphold the decision of the trial court and Tenth Circuit Court of Appeals will lead to all manner of collusive litigation.

For the foregoing reasons and the reasons set forth in the Petition for Writ of Certiorari the petition should be granted.

Respectfully submitted,

HIESTER, TANNER & CLANAHAN

C. Blake Hiester

C. BLAKE HIESTER

Bill Earl Tom

BILL EARL TOM

Barkley L. Clanahan

BARKLEY L. CLANAHAN

Counsel for Petitioner